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NO. 95-1094

In The
Supreme Court of The United States
October Term 1995

DARELENE BANFIELD, Executrix of the Estate of
Harlow F. Banfield, et al.,

Petitioners,

v.

KENNETH W. TURNER, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

Is summary judgement appropriate when the petitioners have presented evidence to raise a question for the jury as to the extent of an anticipated benefit by a plan participant who transferred funds to a defined benefit pension plan when such funds were used to satisfy all plan obligations?

Did the Court of Appeals require a party opposing a motion for summary judgement to show an improper higher standard by requiring that the "evidence submitted by the nonmoving party must be sufficient for a jury to be able to decide in its favor" when this Court has held "all that is required is that sufficient evidence support the claimed factual dispute be shown to require a jury to resolve the parties, differing versions of the truth"?

Is summary judgement appropriate when the evidence relied upon by the Court and Respondents (Moskal Report) is subject to varied interpretation; contains inferences which are contradictory; and on its face contains calculations which have obvious omissions?

Is summary judgement appropriate when the Court of Appeals set forth a

limited statement of the cases "fraud, breach of contract, misappropriation, and no failure to stop known breaches of duty by other fiduciaries" when other causes of action including improper funding of the plan, failure to establish separate beneficiary accounts, equity, negligence, and subjecting a plan beneficiary to contingent tax liability have been factually established by the nonmoving party, contradicting the moving parties evidence?

Does the moving party have the ultimate burden of proof, and did it show, as a matter of law that the establishment of a qualified plan complied with all substantive law including the leased employees status, assignment of income doctrine and that the fiduciaries of the plan did not subject the plan participants to contingent income tax liabilities, to foreclose all material fact inferences?

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PETITIONER'S REPLY BRIEF

Respondents' lack of substantive argument highlights why this Court should grant the petition. They have failed to dispute, thereby concede, the factual and legal basis of the claim that an assignment of income occurred; that via I.R.C. § 401 only "employers" may contribute to a plan; and that the plan was equitable. The burden of proof is on Respondents to show they are entitled to summary judgement as a matter of law, for it is the moving party burden of showing the absence of any genuine issue of material fact. In re Data General Corp. Ameritrust Litigation (1980), 490 F.

Supp. 1089. They have failed to do so. Their continued defiance to defend their position is so obvious as to submit briefs void of any plausible argument; (1) to defend against Lucas v. Earl (1930), 281 U.S. 111 or contradict Miller's admission of an assignment; nor (2) defends any of the elements in I.R.C. § 414(n) "leased employee". Professional & Executive Leasing Inc., v. Commr. (1988, 9th Cir.), 862 F.2d 751. The Court below viewed the funding as "illegal", yet did not resolve assignment vs. leased employee status; that issue is ripe for resolution.

The issues presented create a paradox of great public interest. If certiorari is not granted, this Court will condone fiduciary conduct having pervasive negative impact on federal tax law. If this Court grants certiorari and believes the fiduciaries acted properly, it must overrule the time honored first principle of federal tax law that assignment is not permissive and that I.R.C. § 401 mandates that only an employer can fund a pension. The resolution of the paradox is to grant certiorari, affirming Lucas, supra.

REPLY TO RESPONDENT THOMPSON

The lack of argument is an indicia that Respondents can not remotely defend

their conduct in light of substantive tax law. Any defense of the assignment is at a cost; (1) to concede Miller's admission of the assignment; (2) failure to support the leased employee status; and (3) that the assignment caused tax liability. The assignment was done by Miller's yearly nonreporting of income and Thompson's annual failure to create a separate account causing Banfield injury, which they both concurred and exercised discretionary authority. The breach of duty to stop the assignment or earmark the funds to the Banfield's sole benefit unjustly enriched Turner. Their argument still fails (1) to account for pension savings and checking account balances, (2) to defend a plan underfunding allocated to only two participants.

Despite the Respondents' simplistic denial, the decisions below conflict with: (1) Lucas, supra. not argued in any brief; (2) that a sole proprietor can not contribute to the plan of another employer, to which such sole proprietor is not an employee of the plan and the other business entity is not the employer of the sole proprietor. Peckman v. Board of Trustees(1981, 10th Cir.), 653 F.2d 424, 427 statutory mandate of ERISA 29 U.S.C. § 1103 (c)(1) prohibits proprietors from having the dual status of employer-employee for purposes of ERISA; (3) Federal Courts equitable

powers to award restitution in ERISA cases where principles of equity make such an award appropriate. Kwatcher v. Mass. Service Emp. Pension Fund(1989, 1st Cir.), 879 F.2d 957; (4) plan participants are liable to one who erroneously funded the plan. Fortune v. Medical Assoc. of Woodhill P.C.(1992, E.D. NY), 803 F. Supp. 636; (5) the foreseeability of failure of purpose (i.e. a transfer to a defined benefit plan does not solely benefit the transferor), and the certainty in negligence (i.e. an assignment). Anoke Orthopedic Assoc, P.A. v. Mutschler(1991, D. Minn), 773 F. Supp. 158

REPLY TO RESPONDENT TURNER

The jury question is to what extent did Banfield intend to be benefitted? Mrs. Banfield's stated "to get a bigger piece of the pie". Herr and Jaras state other options should have been used. The Gallagher admits a voluntary saving option was available but unused. The lower courts placed reliance on the Moskal Report that has inherent factual and legal flaws. The report erred in underfunding only two participants; booked loans years after the loan was taken; and more importantly, the inferences drawn by Respondents have serious logical flaws. The argument is an equitable one: that "contributions

equal benefit". However, the report calculated what was left to distribute at termination. Turner's 38% final plan distribution did not include the $70,000 loans and $310,857 annuity that he had already taken out. If those items are put back into the computation, it clearly indicates inequity. Also, calculations excluded Banfield's transfers (App. 48):

Banfield	Banfield	Turner	Total
$272,384	533,338	327,677	861,015
(not incl)	62%	38%	100%

The plan benefits under the formula:

	Banfield	Turner
Pension	413,288	309,120
Integrated	292,947	346,521
Total	706,235	655,641

The 1977 integrated plan provided a greater benefit to Turner. Is it arbitrary that Turner, a plan fiduciary, pass favorable judgement to allow transfers to satisfy all plan costs, resulting his windfall or would equity require those transfers benefit Banfield?

This Court in reviewing a claim must accept Petitioner's version of the facts, since the District Court was required to resolve all genuine disputes as to material facts in plaintiff's favor in granting summary judgement. Bishop v. Wood(1976), 426 U.S. 341; Fed Rule Civ

Proc 56(c). Rule 56(e) permits a summary judgement to be opposed by any of the kinds of evidence in 56(e) including depositions. The material fact required by Rule 56(e) to be present to entitle a nonmoving party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence (emphasis added); rather; all that is required is that sufficient evidence support the claimed factual dispute be shown to require a jury to resolve the parties, differing versions of the truth at trial and must set forth facts showing the existence of a genuine issue for trial. First Nat. Bank v. Cities Service Co. (1968), 391 U.S. 253. The Court below held that "the evidence submitted by the nonmoving party must be sufficient for a jury to be able to decide in its favor", that contradicts First Nat. Bank, supra.

In reversing a summary judgement in Adickes v. S. H. Kress & Co.(1970), 398 U.S. 144, this Court stated: "... Our own scrutiny of the factual allegations of petitioner's complaint as well as the material found in the affidavits and depositions ..., however, convinces us that summary judgement was improper... it is useful to state the factual arguments ... that the sequence of events created a substantial possibility of a conspiracy ... given that the noncircumstantial

evidence of the conspiracy could only come from adverse witnesses...". The same is true here.

The complaint alleged at Par 19- "failed to segregate; give credit to, or account ... for amounts transfer into the pension for Banfield's benefit from the Private Practice Income; failed to properly prepare income tax returns..., and appraise the...contingent tax liability."; Par 20 "failed to disclose ...that transfers...would not increase his retirement benefits since the plan was a defined benefit plan."; Par 25 "failed to segregate those funds for ... or establish a separate employee contribution accounts"; Par 25 "Co-mingled" and "subjected these funds to the general liabilities of plan" ; Par 28 "unjustly enriched Turner" and the prayer for relief included "such other equitable relief as this court may find appropriate ...". All were argued below. The Courts below limited the issues to "fraud, misappropriation or breach of contract by Turner that he knowingly failed to stop." It is clear that the allegations and factual support go beyond this limited statement of the case. The Court below did not require Respondents' to carry their burden, per Adickes, supra, due to a failure to foreclose the possibility of a material fact. Here, the motion did not preclude the existence of improper

funding, or the other factually supported allegations above including exposure to tax liability upon assignment.

Depositions of Gallagher failed to support the claim of leased employee and Miller admitted the assignment of income contra to the leased employee theory and contra to the Mrs Banfield's affidavit that the transfer was classified as a gift; Gabbert and Bennett indicated Dr. Banfield retained control of the private practice which is contra to the leased employee theory; Bennett's deposition of amicable relationship of the doctors contested by Gabbert and Mrs. Banfield; These facts indicate that summary judgement was improper.

The Court of Appeals summarily disregarded the evidence and gave no weight to contradictory depositions; Tax Shelter Proposal; the Herr (stating funding was not proper), Banfield, and Jaras (contradicting the contributions equals benefits conclusion) affidavits; the conflicting facts of the Jaras Report, and refused to apply Lucas, supra. or I.R.C. § 414.

REPLY TO RESPONDENT MILLER

Preemption requires federal jurisdiction of all common law contract and tort claims if the factual basis of

the cause of action involves a qualified plan. Metropolitan Life Ins. Co. v. Taylor(1987), 481 U.S. 58. The consequences of the transfer are all claims involving the plan. State law claims against pension advisors for liability, tort, misrepresentation and calculations were preempted by ERISA and therefore properly before the federal court, included claims of reliance on accountants. Brock v. Self(1986, W.D. La) 632 F. Supp. 1509; See 28 U.S.C. § 1331 claims which "relate to" plans; pendant jurisdiction is appropriate over state law claims under plausible federal claims, Measen v. Bank of Miami(1981, 5th Cir.), 652 F.2d 542.

The material factual disputes exist about Miller's services as intended to benefit Banfield. Without, albeit the improper, assigned income and the failure to report income, the plan could not be carried out. The harms foreseeability in assigning income, and the certainty of the negligence is a jury question. Anoka Orthopedic Associates, P.A., supra.; 29 U.S.C. §§ 1132(a)(2) and 1109(a) Congress took a functional approach to defining a fiduciary under ERISA. Those responsible for formulating a plan were fiduciaries Miller v. Lay Trucking Co. (1985, ND Ind), 606 F. Supp. 1326; Eaton v. D'Amato(1980), 581 F. Supp. 743; Mutual Life Ins. Co. v. Yampol(1980), 840 F.2d

421; advisor aware of conflicting loyalties Leigh v. Engle(1984, Ca 7 III) 727 F.2d 113. Miller denied the prior attempt to classify the transfer as a gift. Mrs. Banfield affidavit alleges Miller classify the transfer as a gift, raising the issue of intent. Finally, Miller's brief states: "...Even if Petitioner's contentions as to alleged improper accounting and improper source of contributions have merit..., these respondent's have no liability." The above, despite the standardized denial without proof of compliance as a matter of law, confirm the unresolved issues. Miller in attempting to pass liability for possible meritorious claims on another party, confesses his own doubt.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that its petition be granted.

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